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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAYNE BRAY, ET AL.,

Petitioners,

v.

ALEXANDRIA WOMEN'S HEALTH CLINIC, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF AMICI CURIAE OF DANIEL BERRIGAN, S.J., JULI LOESCH WILEY, REV. WILL D. CAMPBELL, ELIZABETH OMILAMI, DENNIS SADLER, MARY QUINN KAMBIC, FR. DONALD J. BAUER, FAYE KUNCE, JOHN CAVANAUGH O'KEEFE, CAROL NAN FELDMAN CROSSED, C. WILLIAM MICHAELS, ESQ., MOLLY RUSH, BERNARD AND ROSE MAE BROUSSARD, LANA AND STEPHEN JACOBS, AND CARTHRYN HOLDERREAD PASSMORE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI IN THIS CASE*

Amici are individuals who have been or are actively involved in the civil rights, anti-poverty, labor, and peace movements. Some amici have participated in civil disobedience.

*Counsel of record to the parties in this case have consented to the filing of this brief. Letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.

Amici share a common belief in the importance of nonviolent resistance to injustice. Amici oppose the contention of the Respondents in this case that a nonviolent sit-in is a violation of the federal constitutional right to interstate travel. The notion that civil disobedience itself is a federal constitutional offense is repugnant to the historically valued role of nonviolent protest in this nation and is antithetical to both civil liberty and federalism.

A full list of the individual amici follows:

Daniel Berrigan, S.J.—author; professor of Scripture studies; member, Kairos Community

Juli Loesch Wiley—former organizer, United Farm Workers of America, AFL-CIO

Rev. Will D. Campbell—former head of the Southern Office of the Department of Racial and Cultural Relations of the National Council of Churches

Elizabeth Omilami—organizer for Forsyth County (Georgia) Brotherhood March; member, SCLC

Dennis Sadler—member, Brandywine Peace Alliance; former member, Veterans Against the War

Mary Quinn Kambic—member, Pax Christi, Baltimore; former coordinator, Pittsburgh Draft Resistance; former chair, Pittsburgh Area Students for Peace

Fr. Donald J. Bauer—former member, Congress of Racial Equality; member, Phillip Randolph Institute; labor union activist

Faye Kunce—anti-nuclear activist; member of Amnesty International fast network to protest the death penalty; former director, Seamless Garment Network

John Cavanaugh O'Keefe—peace and civil rights activist; former member, Atlantic Life Community

Carol Nan Feldman Crossed—executive director, Common Ground of Upstate New York; legislative coordinator, New York State 29th District Bread for the World

C. William Michaels, Esq.—producer, New Earth Radio (weekly radio magazine on peace and justice issues); former coordinator, Justice and Peace Office, Archdiocese of Baltimore; coordinator, Pax Christi, Baltimore

Molly Rush—peace organizer; one of the Plowshares Eight

Bernard and Rose Mae Broussard—founders and directors of Starthrowers (peace and justice center) and publishing house on peace and justice issues; active for over 30 years in combating poverty and discrimination throughout the South, especially southern Louisiana

Lana and Stephen Jacobs—founders of the St. Francis Catholic Worker House (shelter for homeless and chronically mentally ill; hospice for AIDS and cancer patients); active for over 20 years in anti-war movement

Cathryn Holderread Passmore—Elder in The Mennonite Church; involved with Mennonite Central Committee; community volunteer counselor; liaison between Oregon State University, Corvallis Police Department, and the community

SUMMARY OF ARGUMENT

The right to interstate travel, historically and as applied without exception by the Court, has two purposes: (i) to prohibit actual barriers to travel across state lines and (ii) to prohibit discrimination against nonresidents. This brief's comprehensive survey of the Court's right to interstate travel cases establishes those two purposes, neither of which applies in this case. Petitioners' proposed nonviolent protest activities did not interfere with travel across state lines in any way and would not have discriminated between residents and nonresidents. Respondents' and the lower courts' rationale effectively creates a new federal tort of obstruction available only to nonresidents and available only because of the fortuity of their residence out-

of-state, not because they are discriminated against in relation to residents.

(The survey of the Court's right to interstate travel cases also reveals a need for the Court to decide finally what constitutional provision is the source of the right, and points to the privileges and immunities clause of article IV as the proper provision. In addition, though Petitioners are entitled to prevail on Respondents' claims for the reasons discussed in the paragraph above even if the Court does not so hold, the right to interstate travel is properly applied only against state action.)

Finally, because the Court's previous right to interstate travel cases so clearly foreclose Respondents' claims in this case, Respondents' claims are patently without merit and are therefore not of sufficient substance to support federal jurisdiction.

ARGUMENT

I. THE RIGHT TO INTERSTATE TRAVEL IS THE RIGHT TO BE FREE FROM DISCRIMINATION AGAINST NONRESIDENTS, AND IS NOT IMPLICATED WHERE, AS HERE, RESIDENTS AND NONRESIDENTS ARE TREATED ALIKE.

A. *The Right To Interstate Travel Is Not A Right Of Unimpeded Movement, But Is The Right To Be Free From Parochialism.*

The scope of the constitutional right to interstate travel does not extend to the presence of an abortion protester who stands in a doorway on private property, blocking an entrance to resident and nonresident clients alike. Instead, as shown by the following exhaustive catalogue of the Court's right to interstate travel cases, *without exception, the Court has held that the right to interstate travel prohibits only (i) actual barriers to* interstate *travel and (ii)* discrimination *against nonresidents (or parochialism). See Zobel* v. *Williams*, 457 U.S. 55, 60 n.6

(1982);[1] *see generally* Note, *State Parochialism, the Right To Travel, and the Privileges and Immunities Clause of Article IV*, 41 STAN. L. REV. 1557 (1989); Bogen, *The Privileges and Immunities Clause of Article IV*, 37 CASE W. RES. L. REV. 794 (1987).

1. The First Hundred Years Of Interstate Travel Cases (1849-1952)

Beginning with the eloquent description of the right to interstate travel in the *Passenger Cases* dissent in 1849,[2] the Court for the next hundred years defended the right against repeated state government encroachments. The Court generally derived the right from the privileges and immunities cause of article IV,[3] but *always* defined the right of interstate travel as a protection against (i) actual barriers to interstate travel and (ii) discrimination against nonresidents.

The first state statute to be invalidated as contrary to the right of interstate travel was Nevada's tax on railroad and stage companies for every passenger carried out of the state, in *Crandall* v. *Nevada*, 73 U.S. (6 Wall.) 35 (1868). The tax clearly operated as a barrier to the passengers' interstate travel. The Court found the right implicit in and essential to the structure of the Union:

---

[1] "In addition to [i] protecting persons against the erection of *actual barriers* to *interstate* movement, the right to travel, when applied to residency requirements, [ii] *protects new residents of a state from being disadvantaged* because of their recent migration *or from otherwise being treated differently from longer term residents.*" 457 U.S. at 60 n. 6 (emphasis added).

[2] 48 U.S. (7 How.) 283, 492 (1849) (Taney, C.J., dissenting).

[3] That clause provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." For most cases under this clause, the terms "citizen" and "resident" are "essentially interchangeable." Austin v. New Hampshire, 420 U.S. 656, 662 (1975); Toomer v. Witsell, 334 U.S. 385, 397 (1948).

> We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, *as freely as in our own States.*

73 U.S. (6 Wall.) at 49 (emphasis added), quoting *Passenger Cases*, 48 U.S. (7 How.) 283, 492 (1849) (Taney, C.J., dissenting).

The following term, in *Paul* v. *Virginia*, 75 U.S. (8 Wall.) 169 (1869), the Court reiterated that the twin functions of the right to interstate travel are to prevent barriers to travel into or out of another state and to prevent parochialism. The Court described the right to interstate travel in the context of the privileges and immunities clause of article IV:

> It was undoubtedly the object of the clause in question to *place the citizen of each State upon the same footing with citizens of other States*, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; *it inhibits discriminating legislation against them by other States;* it gives them the right of free *ingress into* other States, and *egress from* them; *it insures to them in other States the same freedom possessed by the citizens of those States* in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.

75 U.S. (8 Wall.) at 180 (emphasis added).[4]

The cases following *Paul* v. *Virginia* generally involved state discrimination against nonresidents in one form or another, rather than outright barriers to interstate travel such as the

[4] The Court ultimately held that the Virginia statute in question, which required foreign insurance corporations to post large bonds before doing business in the state, did not violate the privileges and immunities clause because that clause affords no protection to corporations. 75 U.S. (8 Wall.) at 177.

exit tax in *Crandall* v. *Nevada*. Thus, in *Ward* v. *Maryland*, 79 U.S. (12 Wall.) 418 (1871), the Court struck down a Maryland statute imposing a tax on nonresident traders as violating the privileges and immunities clause of article IV:

> Taxes . . . may be imposed by a State on all sales made within the State, whether the goods sold were the produce of the State imposing the tax, or of some other State, *providing the tax imposed is uniform;* but . . . *a tax discriminating against* the commodities of the *citizens of the other States* of the Union *would be inconsistent with the provisions of the Federal Constitution*. . . .
>
> . . . [T]he clause plainly and unmistakably secures and protects the right of a citizen of one State *to pass into any other State . . . without molestation; . . . and* to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens.

79 U.S. (12 Wall.) at 430-31 (emphasis added).

In *Blake* v. *McClung*, 172 U.S. 239 (1898), the Court struck down a Tennessee statute giving resident creditors priority over nonresidents. The Court relied on the description of the privileges and immunities clause of article IV in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 77 (1869):

> Its sole purpose was to declare to the several States, that *whatever those rights, as you grant or establish them to your own citizens*, or as you limit or qualify, or impose restrictions on their exercise, *the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.*

172 U.S. at 252 (emphasis added). The Court described the Tennessee statute as "discrimination against citizens of other States [that is] repugnant to" the privileges and immunities clause. 172 U.S. at 254.

> [C]reditors who are citizens of other States are entitled, under the Constitution of the United States, to stand upon the same plane with creditors of like class who are citizens of such State, and cannot be denied equality of right simply

> because they do not reside in that State, but are citizens residing in other States of the Union.

172 U.S. at 258.[5]

In *Chalker* v. *Birmingham & Northwestern Railway Co.*, 249 U.S. 522 (1919), the Court invalidated a Tennessee statute making the amount of an annual tax for the privilege of doing railroad construction work depend on whether the person resided in Tennessee. The infirmity was the statute's "discriminat[ion] between citizens of Tennessee and those of other States . . . contrary to § 2, Art. IV of the Federal Constitution," 249 U.S. at 526. The Court reiterated the equality principle: "Under the Federal Constitution a citizen of one State is guaranteed the right to enjoy in all other States *equality* of commercial privileges with their citizens." 249 U.S. at 527.

Similarly, in *Travis* v. *Yale & Towne Manufacturing Co.*, 252 U.S. 60 (1920), the Court held that New York's denial of certain tax exemptions to nonresidents discriminated in favor of residents in violation of the privileges and immunities clause of article IV. 252 U.S. at 79-80, citing *Blake* v. *McClung*, 172 U.S. at 247.

In *Hague* v. *CIO*, 307 U.S. 496 (1939), a case involving privileges and immunities other than interstate travel, Justice Roberts' plurality opinion described the content of the privileges and immunities clause of article IV:

> [I]t has come to be the settled view that Article IV, § 2, does not import that a citizen of one State carries with him into another fundamental privileges and immunities which come to him necessarily by the mere fact of his citizenship in the State first mentioned, but on the contrary, that in any State every citizen of any other State is

[5] Cf. Williams v. Fears, 179 U.S. 270, 278 (1900) (Georgia tax on business of hiring workers for out-of-state employers did not violate privileges and immunities clause of article IV or fourteenth amendment "as there was no *discrimination* between the citizens of other States and the citizens of Georgia") (emphasis added).

> to have the same privileges and immunities which the citizens of that State enjoy. *The section, in effect, prevents a State from discriminating against citizens of other States in favor of its own.*

307 U.S. at 511 (emphasis added).[6]

A rare outright barrier to interstate travel was presented in *Edwards* v. *California*, 314 U.S. 160 (1941), where the Court struck down a California statute making it a crime to bring into the state a nonresident "indigent person." The majority grounded the decision on the commerce clause. Justice Douglas, concurring, found that the statute violated the "right to move freely *from State to State* . . . protected by the privileges and immunities clause of the Fourteenth Amendment." 314 U.S. at 178.

Finally, in *Toomer* v. *Witsell*, 334 U.S. 385 (1948), the Court struck down South Carolina's exclusionary tax on non-resident shrimpers as violating the privileges and immunities clause of article IV.

> The primary purpose of this clause . . . was to help fuse into one Nation a collection of independent, sovereign States. *It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.*
>
> . . . .
>
> . . . *[T]he purpose of that clause . . . is to outlaw classifications based on the fact of non-citizenship* unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed.

334 U.S. at 395, 398 (emphasis added). In *Mullaney* v. *Anderson*, 342 U.S. 415 (1952), the Court followed *Toomer* and struck down Alaska's discriminatory license fee on nonresident fishermen.

[6] Justice Roberts' opinion was joined by Justice Black in its entirety and by Chief Justice Hughes as to all but an unrelated issue, making it the plurality opinion. 307 U.S. at 500, 532.

2. The Residence Requirement Cases (1969-1986)

More recently, the right to interstate travel has been applied in cases involving state benefits conditioned on residence requirements. Though the textual source of the right has varied or not been located at all, the Court's emphasis has always been on the equality principle underlying the right.

In the first of the modern residence requirement cases involving interstate travel issues, *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), the Court struck down several states' one-year residence requirement for welfare recipients as a violation of the right to interstate travel. The Court emphasized that the parochialism of the waiting-period requirement was unconstitutional:

> Thus, *the purpose of deterring the in-migration* of indigents cannot serve as justification for the classification created by the one-year waiting period, since that purpose *is constitutionally impermissible*. . . .
>
> . . . .
>
> . . . The waiting-period provision *denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction*.

394 U.S. at 631, 634 (emphasis added).[7]

Next, in *Dunn* v. *Blumstein*, 405 U.S. 330 (1971), the Court struck down Tennessee's durational residence requirements for voters as a violation of the right to interstate travel, and therefore as a violation of the equal protection clause of the fourteenth amendment.

> Tennessee's durational residence laws classify bona fide residents on the basis of recent travel, *penalizing those persons, and only those persons, who have gone from one jurisdiction to another* during the qualifying period. Thus, the durational residence requirement directly impinges on the exercise of a . . . fundamental personal right, the right to travel.
>
> . . . Obviously, durational residence laws single out the class of bona fide state and county residents who have recently exercised this constitutionally protected right, and penalize such travelers directly. . .
>
> . . . Durational residence laws impermissibly condition and penalize the right to travel by imposing their prohibitions on *only* those persons who have recently exercised that right.

405 U.S. at 338, 342 (emphasis added).

In *Dunn*, the Court *specifically distinguished situations in which old and new residents are treated alike:*

> Where, for example an interstate migrant loses his driver's license because the new State has a higher age requirement, a different constitutional question is presented. For in such a case, the new State's age requirement is not a *penalty* imposed solely because the newcomer is a new resident; instead, all residents, old and new, must be of a prescribed age to drive. *See Shapiro* v. *Thompson*, 394 U.S. 618, 638 n.21 (1969).

405 U.S. at 342 n.12 (original emphasis).

In *Doe* v. *Bolton*, 410 U.S. 179 (1973), the Court struck down Georgia's residence requirement for abortion recipients as a violation of the nondiscrimination aspect of the right to interstate travel, this time locating the right in the privileges and immunities clause of article IV.

> Just as the Privileges and Immunities Clause, Const. Art. IV, § 2, protects persons who enter other States to ply

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[7] The Court declined "to ascribe the source of this right to travel interstate to a particular constitutional provision," 394 U.S. at 630 & n.8, other than to link it to "the nature of our Federal Union and our constitutional concepts of personal liberty." 394 U.S. at 629. Nevertheless, the Court's treatment of the right to interstate travel is consistent with the Court's previous cases locating the right in the privileges and immunities clause of article IV. *See supra* Section I.A.1 and *infra* Section III.

> their trade, *Ward* v. *Maryland*, 12 Wall. 418, 430 (1871); *Blake* v. *McClung*, 172 U.S. 329, 248-256 (1898), so must it protect persons who enter Georgia seeking the medical services that are available there. *See Toomer* v. *Witsell*, 334 U.S. 385, 396-397 (1948). A contrary holding would mean that a State could limit to its own residents the general medical care available within its borders. This we could not approve.

410 U.S. at 200.

Similarly, in *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974), the Court struck down Arizona's durational residence requirement for government-paid medical care as a violation of the right to interstate travel, and therefore as a violation of the equal protection clause of the fourteenth amendment. The Court again stressed the anti-parochialism purpose of the right:

> Not unlike the admonition of the Bible that, "*Ye shall have one manner of law, as well for the stranger, as for one of your own country,*" Leviticus 24:22 (King James Version), *the right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents.* The State of Arizona's durational residence requirement for free medical care penalizes indigents for exercising their right to migrate to and settle in that State.

415 U.S. at 261 (emphasis added).

In the last decade, the Court has reiterated the two purposes of the right to interstate travel. In *Zobel* v. *Williams*, 457 U.S. 55 (1982), the Court struck down Alaska's dividend distribution scheme as a violation of the equal protection clause of the fourteenth amendment, relying on *Memorial Hospital*, *Dunn*, and *Shapiro*. In the course of its opinion, the Court summarized the protections afforded by the right to interstate travel:

> In addition to [i] protecting persons against the erection of *actual barriers to interstate* movement, the right to travel, when applied to residency requirements [ii] *protects new residents of a state from being disadvantaged* because of their recent migration *or from otherwise being treated differently from longer term residents.*

457 U.S. at 60 n.6.[8] *See also Hooper* v. *Bernalillo County Assessor*, 472 U.S. 612, 618 n.6 (1985) (following *Zobel*, and striking down the residence requirement of New Mexico's veterans' tax exemption statute as violating the equal protection clause of the fourteenth amendment).

Finally, in *Attorney General of New York* v. *Soto-Lopez*, 476 U.S. 898 (1986), the Court struck down the prior residence requirement of New York's civil service veterans' preference laws as a violation of the equal protection clause of the fourteenth amendment. Justice Brennan's plurality opinion also concluded that the residence requirement violated the right to interstate travel, which he described as "the right to migrate." 476 U.S. at 903. In his discussion of the right to interstate travel, Justice Brennan briefly surveyed the Court's right to interstate travel cases and its equal protection cases, concluding:

> The analysis in all of these cases . . . is informed by *the same guiding principle—the right to migrate protects residents of a State from being disadvantaged, or from being treated differently, simply because of the timing of their migration, from other similarly situated residents.*

476 U.S. at 904 (emphasis added).

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[8] Because it viewed "right to travel analysis" as "little more than a particular application of equal protection analysis," the opinion of the Court did not explicitly identify the right to interstate travel as an independent ground for invalidating the Alaska law. *Id.* However, Justice Brennan's concurring opinion (which was joined by Justices Marshall, Blackmun, and Powell) and Justice O'Connor's concurring opinion both agreed that the "threat to free *interstate migration* provides an independent rationale for holding that law unconstitutional." 457 U.S. at 66, 72 (emphasis added).

3. The Private Action Cases

In two racial discrimination cases, the court has held that the right to interstate travel is protected against private as well as state interference. The two purposes of the right—to allow free travel across state lines and to prevent discrimination against nonresidents—remain the same.

In *United States* v.*Guest*, 383 U.S. 745 (1966), the Court upheld an indictment alleging private interference with the right to interstate travel in violation of 18 U.S.C. §241[9] (the criminal analogue of 42 U.S.C. § 1985(3)). The defendants were charged with conspiring to deprive black citizens of the "right to travel freely *to and from* the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce." 383 U.S. at 757 (emphasis added). Accordingly, the Court's discussion of the right to interstate travel focused on its prohibition of *actual barriers* to interstate travel. In holding that the indictment adequately alleged a violation of the right to interstate travel, the Court relied on the *Passenger Cases* (United States citizens "must have the right to pass and repass through every part of it without interruption") and article IV of the Articles of Confederation ("the people of each State shall have *free ingress and regress to and from* any other State"). 383 U.S. at 758 (emphasis added). The Court also relied on *Edwards* v. *California*, 314 U.S. 160, which had invalidated, on commerce clause grounds, a state law raising the actual barrier of criminal penalties against anyone bringing indigent nonresidents into the state. 383 U.S. 758-59.

Consistent with the authorities it had reviewed, the Court then stressed that the conspiracy in this case must actually

[9] That statute made it a federal crime for "two or more persons [to] conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same."

have been aimed at preventing *interstate* travel and not just have coincidentally impeded the movement of a nonresident:

> Thus, for example, a conspiracy to rob an interstate traveler would not, of itself, violate § 241. But *if the predominant purpose of the conspiracy is to impede or prevent the exercise of the right of interstate travel*, or to oppress a person because of his exercise of that right, then, whether or not motivated by racial discrimination, the conspiracy becomes a proper object of the federal law.

383 U.S. at 760 (emphasis added).[10]

Next, in *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971), the Court reversed dismissal of a complaint alleging a violation of 42 U.S.C. § 1985(3) arising out of the white Mississippi defendants' conspiracy, inter alia, to prevent the black plaintiffs interstate travel. (The plaintiffs' driver was from Tennessee and the defendants mistakenly believed him to be "a worker for Civil Rights for Negroes." 403 U.S. at 90, 103.) The Court emphasized that, as pleaded, the complaint adequately alleged that the defendants sought to impose actual barriers to *interstate* travel and to discriminate against nonresidents:

> One of the results of the conspiracy . . . was to prevent the petitioners and other Negroes from exercising their "rights to travel the public highways without restraint *in the same terms as white citizens*" [of the state] . . . Under these allegations it is open to the petitioners to prove at trial that they had been engaging in *interstate travel* or intended to do so, that their federal right to travel interstate was one of the rights *meant* to be discriminatorily impaired by the conspiracy, that the conspirators intended to drive *out-of-state* civil rights workers from the State, or that they meant to deter the petitioners from associating with such persons.

[10] Justice Harlan dissented, arguing that, whatever the source of the right to interstate travel, it is a protection against government interference only. 383 U.S. at 763.

403 U.S. at 106 (emphasis added).[11]

B. Petitioners Did Not Interfere With Nonresidents' Travel Into Virginia And Did Not Discriminate Against Nonresidents.

1. Lack Of Interstate Barriers Or Nonresident Discrimination

Applying the foregoing authorities, Petitioners did not violate Respondents' right to interstate travel because Petitioners did not erect[]. . . . actual barriers to interstate movement" and did not "disadvantage[] [Respondents] because of their recent migration or . . . otherwise . . . treat[] [Respondents] differently from longer term residents." *Zobel*, 457 U.S. at 60 n.6.

Respondents seek to have this Court hold, contrary to all previous cases, that the right to interstate travel bootstraps Petitioners' proposed activities, which may involve simple state law obstruction aimed at both residents and nonresidents alike, into a federal constitutional violation. This is the nondiscriminatory situation that the Court has repeatedly held does not implicate the right to interstate travel. Just as "a conspiracy to rob an interstate traveler would not, of itself, violate" the right to interstate travel, so Petitioners' (anticipated) obstruction of a person who is coincidentally from out of

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[11] In two other recent cases involving *state* action, the Court reiterated that the purpose of the right to travel is to prevent actual barriers to interstate travel and discrimination against nonresidents. In Jones v. Helms, 452 U.S. 412, 422 (1981), the Court held that "a simple penalty for leaving a State is plainly impermissible," citing Crandall, 73 U.S. (6 Wall.) 35, and Edwards, 314 U.S. 160. In Village of Belle Terre v. Borass, 416 U.S. 1 (1974), the Court upheld against a right to travel challenge a village zoning ordinance limiting land use to single-family dwellings. The Court held that the ordinance did not interfere with the right to travel or the right to migrate to and settle within a state because the ordinance "is not aimed at transients." 416 U.S. at 7.

the state does not violate the right to interstate travel. *Guest*, 383 U.S. at 760. And just as an interstate migrant who "loses his driver's license because the new State has a higher age requirement" has no constitutional claim because "the new State's age requirement is not a *penalty* imposed solely because the newcomer is a new resident," so Respondents have no constitutional claim because Petitioner's proposed rescue activities would not be a penalty imposed solely on Respondents as nonresidents. *Dunn*, 405 U.S. at 342 n.12 (original emphasis).

2. Absolute Distinction From State Action And Private Action Cases

Thus, this case is critically different from all of the state action cases discussed above. Petitioners erected no barriers to travel across state lines. *Cf. Crandall*, 73 U.S. (6 Wall.) 35; *Edwards*, 314 U.S. 160; *Shapiro*, 394 U.S. 618. Nor did Petitioners discriminate at all between residents and nonresidents. *Cf. Ward*, 79 U.S. (12 Wall.) 418; *Toomer*, 334 U.S. 385; *Dunn*, 405 U.S. 330.

This case is also critically different from the private action cases, for the same reasons. Unlike the defendants in *Guest*, Petitioners did not interfere with Respondents' "travel . . . *to and from* the State of" Virginia, and did not act with the "predominant *purpose . . . to impede or prevent the exercise of the right to interstate travel.*" 383 U.S. at 757, 760 (emphasis added). *See also Griffin*, 403 U.S. at 106 (requiring plaintiffs to prove "that their federal right to travel interstate was one of the rights *meant* to be *discriminatorily* impaired by the conspiracy") (emphasis added).

Unlike the defendants in *Griffin*, Petitioners did not aim their proposed rescue activities at nonresidents; that is, Petitioners did not propose to prevent access to abortion clinics by nonresidents while allowing residents to enter. Respondents' right to interstate travel was not "one of the rights meant to be *discriminatorily* impaired by" Petitioners, and Petitioners did

not "intend[] to drive *out-of-state*" abortion seekers from Virginia. 403 U.S. at 106 (emphasis added).

II. THE RIGHT TO INTERSTATE TRAVEL DOES NOT CONFER RIGHTS ON NONRESIDENTS THAT EXCEED THE RIGHTS OF RESIDENTS. THEREFORE, THE LOWER COURTS ERRED IN CREATING A NEW FEDERAL TORT OF OBSTRUCTION THAT APPLIES ONLY TO NONRESIDENTS.

A. Under The Right To Interstate Travel, Nonresidents Are Entitled Only To The Same Rights As Residents.

The right to interstate travel has never meant more than that "a citizen of State A who ventures into State B [has] the *same* privileges which the citizens of State B enjoy." *Toomer*, 334 U.S. at 395 (emphasis added). *See also Soto-Lopez*, 476 U.S. at 904 ("the right to migrate protects residents of a State from being disadvantaged, or from being treated differently, from other similarly situated residents"); *Zobel*, 457 U.S. at 60 n.6 (right to interstate travel "protects new residents of a state from being disadvantaged . . . or from otherwise being treated differently from longer term residents"); *Memorial Hospital*, 415 U.S. at 261 ("the right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents"); *Hague*, 307 U.S. at 511 (privileges and immunities clause of article IV "prevents a State from discriminating against citizens of other States in favor of its own"); *Chalker*, 249 U.S. at 26 (tax whose amount depends on residence unconstitutionally discriminates between residents and nonresidents); *Blake*, 172 U.S. at 258 (nonresident creditors "cannot be denied equality of right" with resident creditors); *Ward*, 79 U.S. (12 Wall.) at 430-31 (sales tax may not discriminate against the goods of nonresidents); *Paul*, 75 U.S. (8 Wall). at 180 (nonresidents are to be insured "the same freedom possessed by the citizens of those States" into which the nonresidents travel).

Litigants have occasionally suggested, as Respondents do indirectly here, that nonresidents are to be treated more favorably than residents as a result of the right to interstate travel. The Court has rebuffed those suggestions. Very early, the Court defined the limits of the right to interstate travel:

> Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, *neither more nor less*, shall be the measure of the rights of citizens of other States within your jurisdiction.

Blake, 172 U.S. at 252 (emphasis added), quoting *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 77. The Court emphasized the limits of the right again in *Hague*:

> [I]t has come to be the settled view that Article IV, § 2, *does not import that a citizen of one State carries with him into another fundamental privileges and immunities which come to him necessarily by the mere fact of his citizenship in the State first mentioned*, but, on the contrary, that in any State every citizen of any other State is to have the same privileges and immunities which the citizens of that State enjoy. The section, in effect, prevents a State from discriminating against citizens of other States in favor of its own.

307 U.S. at 511 (emphasis added).

B. The Lower Courts Exceeded The Proper Scope Of The Right To Interstate Travel In Creating A New Federal Tort Of Obstruction That Applies Only To Nonresidents.

The Fourth Circuit's decision in this case effectively converts state law obstruction into a federal constitutional tort available *only* to nonresidents, *not* because they are discriminated against in relation to residents, but *solely* because of the serendipity of their out-of-state residence. *NOW* v. *Operation Rescue*, 914 F.2d 582, 585 (4th Cir. 1990). To reach this result, the Fourth Circuit ignored the established limits of the right to interstate travel and failed to examine any of this Court's

interstate travel cases or to engage in any analysis of the proper contours of the right.

Instead, the Fourth Circuit simply followed the Second Circuit's holding in *New York NOW* v. *Terry*, 886 F.2d 1339 (2d Cir. 1989), that "blocking access to medical services provided by abortion facilities which serve an interstate clientele violates the constitutional right to travel." *NOW* v. *Operation Rescue*, 914 F.2d at 585. However, the Second Circuit analysis of the right to interstate travel was equally insufficient. The Second Circuit leapt from the premise that the right to interstate travel is enforceable against private action to the conclusion that Operation Rescue's activities violated that right, without ever explaining why unimpeded access to an abortion clinic is protected (for nonresidents only) by the right to interstate travel. *New York NOW* v. *Terry*, 886 F.2d at 1360-61. The Second Circuit pointed to only one decision of this Court to support its conclusion, *Doe* v. *Bolton*, 410 U.S. 179, citing *Doe* for the proposition that "the right to travel 'protects persons who enter [a State] seeking the medical services that are available there.'" 886 F.2d at 1360, quoting 410 U.S. at 200.

However, the Second Circuit ignored the explicit rationale of *Doe* v. *Bolton*, which this Court had stated in the very next sentence of its opinion: "A contrary holding would mean that a State could limit to *its own residents* the general medical care available within its borders." 410 U.S. at 200 (emphasis added). *Doe* v. *Bolton*, therefore, held only that nonresidents may not be denied access to medical services *to which residents have access*.

Here, Petitioners' intended activities made no such discriminatory distinction—if Petitioners had blocked access to abortion services, they would have done so to residents and nonresidents alike. This case is therefore completely unlike *Doe* v. *Bolton*, and the Second Circuit's (and necessarily the Fourth Circuit's) reliance on that decision is erroneous.[12] The

[12] The district court in this case, apparently tracking the Second Circuit's decision, also relied solely on Doe v. Bolton. NOW v. Operation Rescue, 726 F. Supp. 1483, 1493 (E.D. Va. 1989).

right to interstate travel grants nonresidents no federal constitutional right, in addition to whatever state law rights may exist, to be free from abortion protest activities (or other protest activities) that affect residents and nonresidents alike.

III. THE RIGHT TO INTERSTATE TRAVEL, WHICH HAS ITSELF TRAVELED TO SEVERAL PROVISIONS OF THE CONSTITUTION, SHOULD BE SPECIFICALLY IDENTIFIED AS RESIDING IN THE PRIVILEGES AND IMMUNITIES CLAUSE OF ARTICLE IV.

A. Most Of This Court's Right To Interstate Travel Cases Have Been Expressly Premised On Article IV.

Although various members of the Court have identified several possible sources of the right to interstate travel,[13] more often than not the source of the right has been identified as the privileges and immunities clause of article IV. *E.g.*, *Doe* v. *Bolton*, 410 U.S. at 200; *Mullaney*, 342 U.S. 415; *Toomer*, 334 U.S. at 395, 398; *Hague*, 307 U.S. at 511 (plurality opinion); *Travis*, 252 U.S. at 79-80; *Chalker*, 249 U.S. at 526; *Blake*, 172 U.S. at 252; *Ward*, 79 U.S. (12 Wall.) at 430-31; *Paul*, 75 U.S. (8 Wall.) at 180. *See also Note, State Parochialism, the Right To Travel, and the Privileges and Immunities Clause of Article IV*, 41 STAN. L. REV. 1557 (1989) ("The Court has generally viewed this kind of resident/nonresident discrimination as sub-

[13] These alternative sources are: (i) the commerce clause, *see* Edwards, 314 U.S. at 173; (ii) fifth amendment due process clause, see Kent v. Dulles, 357 U.S. 116, 125 (1958); (iii) fourteenth amendment equal protection clause, *see* Hooper, 472 U.S. at 618 n.6; Zobel, 457 U.S. at 60 n.6; (iv) fourteenth amendment privileges and immunities clause, *see* Edwards, 314 U.S. at 177-78 (Douglas, J., concurring); Slaughter-House Cases, 83 U.S. (16 Wall.) at 77; and (v) "the federal structure," *see* Zobel, 457 U.S. at 67 (Brennan, J., concurring); Crandall, 73 U.S. 16 (6 Wall.) at 43. *See generally* Guest, 383 U.S. at 764-70 (Harlan J., dissenting) (surveying "the several asserted constitutional bases for the right to travel").

ject to the strictures of the privileges and immunities clause of article IV").[14]

B. History Supports Article IV As The Proper Residence Of The Right To Interstate Travel.

Some recent decisions of the Court have declined "to locate this right [to interstate travel] definitively in any particular constitutional provision." *Soto-Lopez*, 476 U.S. 902 (plurality opinion); *Jones*, 452 U.S. at 419; *Shapiro*, 394 U.S. at 630 & n.8; *Guest*, 383 U.S. at 759. Such decisions make the right unnecessarily amorphous, and, unfortunately, leave a cloud over its legitimacy.

Justice O'Connor has disagreed with the Court's non-textual approach, arguing that the "free-floating 'right to migrate,'" *Soto-Lopez*, 476 U.S. at 918 (O'Connor, J., dissenting), properly finds its residence in article IV. "[T]his analysis supplies a needed foundation for many of the 'right to travel' claims discussed in the Court's prior opinions." *Zobel*, 457 U.S. at 74 (O'Connor, J., concurring). In *Soto-Lopez*, Justice O'Connor, joined by Justices Rehnquist and Stevens, reiterated that "the Privileges and Immunities Clause of Art. IV, § 2, of the Constitution supplies the relevant basis for analysis in evaluating claims . . . where the principal allegation is that the state scheme impermissibly distinguishes between state residents, allegedly imposing a relative burden on those who have more

[14] Recent decisions premised on the privileges and immunities clause are motivated by the same parochialism concerns underlying the right to interstate travel cases. *E.g.*, Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985) (New Hampshire's exclusion of nonresident attorneys from bar admission unconstitutional); United Building and Construction Trades Council v. Camden, 465 U.S. 208 (1984) (city ordinance reserving 40% of jobs on city construction projects for residents unconstitutional); Hicklin v. Orbeck, 437 U.S. 518 (1978) (Alaska's absolute preference for hiring residents in oil and gas projects with state leases unconstitutional).

recently exercised their right to establish residence in the State." 476 U.S. at 920 (O'Connor, J., dissenting).

Justice O'Connor's is the correct position, comporting best with the majority of the Court's prior decisions and with history. Professor Bogen, after exhaustively detailing the history of article IV's privileges and immunities clause, concludes: "Justice O'Connor is on excellent historical ground in rooting the right to travel in the article IV privileges and immunities clause." Bogen, *The Privileges and Immunities Clause of Article IV*, 37 CASE W. RES. L. REV. 794, 852 (1987). That clause was designed to "creat[e] a national citizenship," *id.* at 796, and did so in large part by securing the right to interstate travel:

> [The privileges and immunities clause] referred to the rights of citizens of the nation to travel freely among the states, to become full citizens of any state they wished without discrimination based on place of prior residence, and to be free of discrimination based on nonresidence when they merely visited another state.

Id.

Thus, the Court's allusion to Old Testament law in *Memorial Hospital*, 415 U.S. at 261 ("Ye shall have one manner of law, as well for the stranger, as for one of your own country," Leviticus 24:22), is an apt description of the basic principle of the right to interstate travel, but the right *does* have a specific textual source in the Constitution. "[T]here is no need to seek Biblical support for the principle of interstate equality; the privileges and immunities clause of article IV is much closer to hand." Note, 41 STAN L. REV. at 1591.

C. Whether It Resides In Article IV Or Elsewhere, The Right To Interstate Travel Properly Protects Against State Interference Only And Does Not Apply Against Private Action As In This Case.

Contrary to the Court's holding in *Guest*, the reasoning of all of the Court's previous cases does *not* "support[] the conclusion that the constitutional right to interstate travel is a right

secured against interference from any source whatever, whether governmental or private." 383 U.S. 759-60 n.17. The Court's previous cases all addressed *government* interference and located the right in specific, albeit varying, constitutional provisions, none of which supported the extension of the right to private interference. Only by failing to identify the textual source of the right to interstate travel was the Court able to rationalize its novel extension in *Guest*, as Justice Harlan's dissent makes clear.

As Justice Harlan argued, "the several asserted constitutional bases for the right to travel"—the privileges and immunities clause of article IV, the commerce clause, and the due process clause of the fifth amendment—all address only state action. 383 U.S. at 764, 767-70 (Harlan, J., dissenting).[15]

> [As to article IV,] [i]t is . . . apparent that the right to unimpeded interstate travel, regarded as a privilege and immunity of national citizenship, was historically seen as a method of breaking down state provincialism, and facilitating the creation of a true federal union. In the one case in which a private conspiracy to obstruct such movement was heretofore presented to this Court, the predecessor of the very statute we apply today was held *not* to encompass such a right.
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> . . . .
>
> . . . [As to the commerce clause,] this approach to the right to travel, like that found in the privileges and immunities cases, is concerned with the interrelation of state and federal power, *not . . . with private interference*.
>
> . . . .
>
> I cannot find in any of this past case law any solid support for a conclusion that the Commerce Clause embraces a right to be free from private interference.
>
> . . . .
>
> [As to fifth amendment due process,] [v]iewing the right to travel in due process terms, of course, would clearly make it inapplicable to the present case, for due process speaks only to *governmental* action.
>
> . . . .
>
> This survey of the various bases for grounding the "right to travel" is conclusive only to the extent of showing that there has never been an acknowledged constitutional right to be free from private interference, and that the right in question has traditionally been seen and applied, whatever the constitutional underpinning asserted, only against *governmental* impediments.

Id. at 767, 768-69, 770, 771 (emphasis added).

The same is true of the two other occasionally asserted bases of the right, the fourteenth amendment and "the federal structure." *See supra* note 14. The fourteenth amendment by its terms is limited to state action ("No State shall . . . abridge the privileges or immunities of citizens . . . nor deny . . . the equal protection of the laws"). The "federal structure" basis for the right similarly encompasses only state action that interferes with the ties that bind the nation. *See Zobel*, 457 U.S. at 67 (Brennan, J., concurring) ("I find [the right to interstate travel's] unmistakable essence in that document that transformed a loose confederation of States into one Nation"); *Crandall*, 73 U.S. (6 Wall.) at 44 ("no power can exist in a State to obstruct this right that would not enable it to defeat the purposes for which the government was established").

In addition to the historical and textual arguments, two prudential considerations support the limitation of the right to interstate travel to freedom from state interference. First is the vast difference in the effect of state interference compared

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[15] Assuming arguendo that the commerce clause authorizes Congress to prohibit private interference with the right to interstate travel, and assuming that Congress could define interstate travel to include access to the entrance of an out-of-state abortion clinic, Congress has not done so. As Justice Harlan noted with regard to the criminal analogue of § 1985(3), "No 'right to travel' can be found in [18 U.S.C.] § 241 or in any other law of the United States." Guest, 383 U.S. at 763 (Harlan, J., dissenting). Absent such an independently existing right, Respondents have no cause of action under 42 U.S.C. § 1985(3). Great American Federal Savings & Loan Association v. Novotny, 442 U.S. 366, 372 (1979).

to private interference, as well as the greater difficulty in remedying state interference, as noted by Justice Harlan. "There is a difference in power between States and private groups so great that analogies between the two tend to be misleading." *Guest*, 383 U.S. at 772 (Harlan, J., dissenting).

Second, "[t]o decline to find a constitutional right [against private interference] does not render the Federal Government helpless." *Id.* Congress already "has wide authority to legislate in this area" under the commerce clause (to the extent widespread private action sufficiently impedes commerce), and under the Civil Rights Act of 1964 and perhaps other sources. *Id.* Therefore, it is not only constitutionally erroneous but also "unnecessary . . . to strain to find a dubious constitutional right." *Id.*

Thus, the Court should overrule that portion of *Guest* that, contrary to constitutional language and without statutory justification, extends the right to interstate travel to private action.[16]

IV. RESPONDENTS' CONSTITUTIONAL CLAIM IS NOT OF SUFFICIENT SUBSTANCE TO SUPPORT FEDERAL JURISDICTION

A. Federal Jurisdiction Does Not Exist Where Prior Decisions Render The Claims Patently Without Merit.

Federal courts may entertain constitutional claims only when they are "of sufficient substance to support federal jurisdiction." *Hagans* v. *Lavine*, 415 U.S. 528, 536 (1974). The Court summarized the doctrine of "constitutional insubstantiality" in *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978):

[16] The result in Guest need not change. Justice Harlan concurred in the holding that the indictment should be upheld, but on the grounds that it sufficiently alleged state interference with interstate travel. 383 U.S. at 774.

> [T]he test is whether "the cause of action alleged is *so patently without merit* as to justify . . . the court's dismissal for want of jurisdiction.'" *Hagans* v. *Lavine*, 415 U.S. 528, 542-43 (1974), quoting *Bell* v. *Hood*, [327 U.S. 678, 683 (1946)]. (Emphasis added.) *See also Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 666 (1974) (test is whether right claimed is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy").

438 U.S. at 70-71. *See also Hagans*, 415 U.S. at 536-38; *Goosby* v. *Osser*, 409 U.S. 512, 522 (1973) (claims not foreclosed by prior decision because prior decision specifically anticipated differences in claims and suggested those differences might affect outcome); *Siler* v. *Louisville & Nashville Railroad Co.*, 213 U.S. 175, 191 (1909) ("the Federal question must not be merely colorable").[17]

B. This Court's Prior Decisions Concerning The Right To Interstate Travel Render Respondents' Claims Patently Without Merit.

Respondent's constitutional claim against Petitioners is patently without merit because it is foreclosed by the Court's previous cases involving the right to interstate travel. As demonstrated above, those cases clearly establish that the right to interstate travel is not infringed where there is no actual barrier to travel across state lines and no discrimination against nonresidents. *See Zobel*, 457 U.S. at 60 n.6. Here, it is undisputed that Petitioners' proposed activities (i) would not have prevented or interfered with Respondents' travel into or out of Virginia and (ii) made no distinction between residents and nonresidents.

[17] Applying this doctrine of constitutional insubstantiality, the Second Circuit recently dismissed the Town of West Hartford's RICO action against Operation Rescue because the town could not demonstrate extortion under any conceivable theory. Town of West Hartford v. Operation Rescue, 915 F.2d 92 (2d Cir. 1990).

CONCLUSION

The Fourth Circuit incorrectly held that Petitioners' activities would violate Respondents' right to interstate travel. The right to interstate travel is not a right to unimpeded movement within a state, but is the right to move across state lines and to be treated the same as residents are treated. It is not a right to be treated more favorably than residents, so that the Fourth Circuit incorrectly converted potential state law obstruction claims into federal constitutional claims for non-residents only. The privileges and immunities clause of article IV should be recognized as the textual and historical source of the right to interstate travel. (Wherever the right is located, however, it does not protect against merely private action such as Petitioners'.) In light of this Court's prior decisions on the right to interstate travel, Respondents' constitutional claim is patently without merit, so that it is not of sufficient substance to support federal jurisdiction.

For the forgoing reasons, amici curiae respectfully urge this Court to reverse the judgment of the U.S. Court of Appeals for the Fourth Circuit in this case.

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